IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Corporate Lodging Consultants, Inc. Plaintiff, v. Bombardier Aerospace Corporation Defendant.	)	Case No. 03-1467-WEB

MEMORANDUM AND ORDER

Now before the Court is defendant's motion for summary judgment. Corporate Lodging Consultants, Inc., (CLC) is suing to enforce the right to collect late fees under a contract while Bombardier states that CLC has waived this right. The Court has jurisdiction over this case under 28 U.S.C. §1332 and jurisdiction is not disputed.

CLC offers lower rates at hotels for those companies using their services. Bombardier is in the aircraft industry and used CLC's services.

FACTS

1. The System Lodging Agreement dated May 8, 2001 between CLC and Bombardier in Section 2.d) provides in relevant part:

> i. COMPANY (Bombardier) agrees to:
>
> ....
>
> d) Promptly pay CLC by electronic transfer within seven (7) business days of receipt of CLC invoice for all valid hotel charges billed to COMPANY.

> Payments not made within agreed terms will incur a one and one-half percent (1.5%) late fee...

2. Historically, CLC has charged late fees to only a few of its customers.

3. As to those customers, CLC assessed the late fees as part of invoices it sent to the customers.

4. CLC never charged Bombardier a late fee on any invoice.

5. From June to October 2002, there was e-mail correspondence between CLC and Bombardier concerning alleged past due invoices and payments.

6. On June 5, 2002, Kyle Rogg of CLC sent an e-mail to Jeff Zimmerman of Bombardier, requesting him to follow up on an outstanding invoice. On June 10, 2002, Zimmerman replied that the invoice had been paid by check mailed on June 7, 2002.

7. On June 20, 2002, Rogg sent an e-mail to Zimmerman, advising of an outstanding invoice. Absent from Rogg's e-mail was any mention of late fees.

8. On September 4, 2002, Rogg sent an e-mail to Zimmerman, requesting his assistance in collecting outstanding invoices. Absent from Rogg's e-mail was any mention of late fees.

9. On September 20, 2002, Rogg sent an e-mail to Roy King of Bombardier in an effort to follow-up on a late payment. Rogg did not mention late fees in this e-mail. On September 23, 2002, Rogg again inquired as to the late payment and King replied that the funds would be wire transferred that day.

10. On September 26, 2002, Rogg sent an e-mail to King advising of an outstanding invoice dated September 10, 2002. Rogg wrote "I'd like to avoid charging past due fees to Bombardier. Can you have this wired by the end of the week?". On October 1, 2002, King replied that the money had been sent on September 30, 2002.

11. On October 16, 2002 Rogg sent an e-mail to King stating that an invoice was past due and requested that King expedite payment. On October 24, 2002, Rogg sent another e-mail stating "[t]wo more invoices are now past due. We need payment within contractual terms". Bombardier paid these invoices.

12. Bombardier has paid all CLC invoices, although CLC had to follow up on outstanding invoices to ensure payment.

13. CLC never billed or invoiced Bombardier for a late fee. CLC adds that there was never any express waiver of the late fees.

14. The late fees on the Bombardier account were calculated when the plaintiff commenced this civil action on November 20, 2003.

15. CLC asks for $65,188 in late fees covering the period from July 30, 2001 to September 10, 2003.

16. Under the contract, Bombardier made some untimely payments to CLC. Bombardier purports to contradict this by offering the deposition of Michael Trainor who states that he has no knowledge of late payments; however, Bombardier's other exhibits(Def. ex. 14,15, 16, 17, 18,19,20 and Rogg Dep.) show that some payments were untimely.

STANDARD

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A principal objective of

the summary judgment rule is to isolate and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986).

A fact is "material" if under the substantive law it is essential to the proper disposition of the claim." *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1234-1232 (10th Cir. 2001) quoting *Adler v. Wal-Mart Stores*, 144 F.3d 664, 670 (10th Cir. 1998). "An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler*, 144 F.3d at 670.

"The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler*, 144 F.3d at 670; *See Celotex*, 477 U.S. at 323. The movant can do this by demonstrating a lack of evidence or an essential element of the nonmovant's claim. *Adler*, 144 F.3d at 670; *See Celotex*, 477 U.S. at 323. "If the movant carries this initial burden, the nonmovant that would bear the burden of persuasion at trial may not simply rest upon pleadings; the burden shifts to the nonmovant to go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) quoting Fed.R.Civ.P 56.

"[S]ummary judgment is not a disfavored procedural shortcut; rather, it is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action'" *Wichita Investors, L.L.C. v. Wichita Shopping Ctr. Assocs.*, 267 F.Supp.2d 1049, 1051-1052 (D.Kan. 2003) quoting *Celotex*, 477 U.S. at 327.

ANALYSIS

A federal court sitting in diversity jurisdiction applies the substantive law and the choice of law provisions of the forum state, which in this case is Kansas. *Missouri P.R. Co. v. Kansas Gas & Electric Co.*, 862 F.2d 796, 798 n1 (10th Cir. 1988). When analyzing choice of law with respect to contract construction, Kansas applies the rule of lex loci contractus (ie., the place of the making). *Id.* The parties do not state where the contract was made; however, both parties supported their arguments in the briefs using Kansas law. The Court will apply Kansas law to this motion for summary judgment.

"Waiver in contract law implies that a party has voluntarily and intentionally renounced or given up a known right, or has caused or done some positive act or positive inaction which is inconsistent with the contractual right. *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527 (1977). "Waiver may be inferred from the conduct of the parties." *Concrete Accessories Co. v. Moses*, 32 Kan.App.2d 1120, 1126 (2004); *Wichita Investors*, 267 F.Supp.2d at 1059.

The Court also notes that "[w]hether there has been a waiver is generally a question of fact.... Where, however, the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law." *Kansas Wheat Growers Association v. Windhorst*, 129 Kan. 528, 535 (1930)(citation omitted). "Once it has been established that a right has been waived, the party possessing the contractual right is precluded from asserting it in a court of law. *United American State Bank*, 221 Kan. at 526-527.

Bombardier argues that CLC waived its right to collect late fees because of CLC's statements and actions. Specifically Bombardier points to the following uncontroverted facts:

1. The System Lodging Agreement provides for a 1.5% late fee to any invoice not paid within

seven days.

2. When CLC did charge a late fee to other customers, CLC assessed the late fees as part of invoices.

3. CLC never charged Bombardier a late fee for any of their late payments during their business association, from July 30, 2001 to September 10, 2003, until this lawsuit.

4. On September 26, 2002, Rogg sent an e-mail to King advising of an outstanding invoice dated September 10, 2002. Rogg wrote "I'd like to avoid charging past due fees to Bombardier. Can you have this wired by the end of the week?".

CLC argues that these facts do not show that there was a voluntary and intentional waiver. Instead, the facts show a mere silence or indulgence; thereby preserving CLC's ability to collect these fees. *St. Francis Reg'l Med. Ctr. v. Critical Care,* 997 F.Supp. 1413 (D.Kan. 1997).

Plaintiff relies on *St. Francis Regional Medical Center* to support its position that the conduct was not a waiver but silence or indulgence. *St. Francis Reg'l Med. Ctr.*, 997 F.Supp. at 1413. St. Francis contracted with CCI to provide malpractice insurance for temporary nurses. *Id.* at 1421. CCI gave certificates of insurance to St. Francis. *Id.* There was a malpractice suit involving a temporary nurse and St. Francis settled. *Id.* St. Francis sued to for a breach of contract for failing to provide liability insurance for this nurse. *Id.* at 1434. CCI moved for summary judgment arguing that St. Francis' acceptance of the insurance certificate without complaint amounted to a waiver of their right to assert a breach of contract claim for inadequate insurance. *Id.* at 1434. The court rejected CCI's motion and found that there was a genuine issue of material fact regarding plaintiff's intent to waive this right. *Id* at 1439.

The facts in this case are distinguishable. First, unlike *St. Francis*, there is no factual dispute

regarding CLC's knowledge of this contractual right to assess late fees. Second, CLC's conduct over the two years of the contract show a voluntary and intentional inaction or failure to assert this right to collect late fees for belated payments. Plaintiff's claims that its actions were mere silence or indulgence are rendered less plausible by plaintiff's own statements.

The Rogg e-mail shows that CLC knew they could assert this right to late fees when he wrote "There is another past due invoice. I'd like to avoid charging past due fees to Bombardier. Can you have this wired by the end of the week?". (Def. ex. 19). Plaintiff argues that "the reference to the right to charge the fees indicates a clear, unequivocal recognition of the right and [CLC's] continued power to exercise it". (Pl. Br. at 10). While Rogg's statement is a recognition of the right to charge late fees it is also shows an intent not to charge those late fees and it is the failure to exercise this right that constitutes a waiver. *Long v. Clark,* 90 Kan. 535, 537 (1913)(Forfeiture clauses of a contract may be waived where one party, either by his statements or a course of conduct, leads the other party to believe that he will not insist on a forfeiture); See also *Prather v. Colorado Oil & Gas Corp*., 218 Kan. 111, 117 (1975)(The intent to waive known rights is essential).

Plaintiff argues that there cannot be a waiver because it did not delay too long to assert its right to late fees. Plaintiff is attempting to collect late fees from as early as July 2001 and as recent as September 2003. This argument is unpersuasive as there is no absolute time requirement necessary to constitute a waiver. In fact, there are cases holding a waiver of rights after only a few months. See *Smith v. Smith,* 186 Kan. 728, 735 (1960)(party waived acceleration clause by consenting to three months of late payments); *D.M.Ward Constr. Co. v. Electric Corp. of Kansas City,* 15 Kan. App. 2d 114, 118 (1990)(Right to arbitration waived because party did not file timely motion).

Plaintiff also notes that Bombardier did not suffer any detriment or prejudice by not having to immediately pay late fees. Bombardier does not have to show detriment or prejudice because it is not an element of waiver. *United American State Bank,* 221 Kan. at 526-527(Equitable estoppel, not waiver, requires that a party be prejudiced by reliance upon another's statements); *United Cities Gas Co. v. Brock Exploration Co.,* 995 F.Supp. 1284, 1297 (D.Kan. 1998).

In plaintiff's final argument, he cites a case where the court found no waiver of a right to prompt payment despite a parties' silent acceptance of late payments. *Nelson v. Robinson*, 184 Kan. 340, 347 (1959). Plaintiff has introduced many exhibits showing their repeated requests for payment and payment "within contractual terms". This however is not the issue. Defendant does not state that acceptance of late payments equals a waiver of the late fees but rather that the refusal to charge late fees amounts to a waiver. Additionally, plaintiff's statement in the Rogg e-mail is not indulgence or silent acquiescence but a positive statement showing an intent not to exercise the right to late fees. *Id.* at 347(General rule is that no mere indulgence or silent acquiescence can be construed as a waiver). The *Nelson* case is distinguishable.

The uncontroverted facts show that plaintiff's conduct and statements amount to a voluntary and intentional failure to charge late fees over a period of two years. Because there is no genuine issue of material fact, the issue of waiver is a question of law. *Kansas Wheat Growers Association,* 129 Kan. at 535. The Court finds that plaintiff has waived the right to collect late fees.

It is further ORDERED that Defendant's Motion for Summary Judgment be GRANTED.

SO ORDERED this 4th day of January 2005.

s/ Wesley E. Brown

Wesley E. Brown, U.S. Senior District Judge